

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000367-001 DT

10/01/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

K. Waldner

Deputy

SHAUN DUNCAN

SHAUN DUNCAN

11424 NE 86TH ST

KIRKLAND WA 98033

v.

ALAN PEDDLE (001)

KIP M MICUDA

HASSAYAMPA JUSTICE COURT

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2012-059530

Defendant-Appellant Allan Peddle (Defendant) appeals the Hassayampa Justice Court's determination affirming Shaun Duncan's Order of Protection. Defendant contends the trial court erred. For the reasons stated below, the court vacates the trial court's judgment and remands the matter to the trial court for a new hearing.

I. FACTUAL BACKGROUND.

On March 26, 2012, Plaintiff obtained an Order of Protection against Defendant after claiming Defendant engaged in dangerous driving behavior when Plaintiff was picking up his son at the Surprise Police station for his parenting time. The Order of Protection precluded Defendant from going to Plaintiff's home or workplace in Washington State and restricted Defendant from (1) initiating contact with Plaintiff; (2) coming within 300 feet of Plaintiff; or (3) coming within ¼ mile of Plaintiff's residence. On April 3, 2012, Defendant requested a hearing on the Order of Protection (1) denying all the allegations and (2) alleging the Order of Protection was "the continuance of harassing actions Mr. Duncan caused in Wash. [sic] State." The Request For Hearing was dated March 26, 2012, although Defendant was not served with the Order of Protection until March 29, 2012. The trial court file reflects statements from (1) Defendant; (2) Defendant's wife—Delores Peddle; and (3) Defendant's daughter—Christine Peddle-Cornish, who is the mother of the child—Senna—Plaintiff and she have in common. The substance of all three statements is their belief Plaintiff sought the Order of Protection to secure a

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benefit to be used in the custody case about Senna currently pending in Washington State. Ms. Peddle-Cornish's statement references pending domestic violence charges against Plaintiff in Washington State as well as the temporary custody order currently in effect in Washington State. The trial court file also shows Plaintiff received prior citations or had prior contacts with the legal system in 1988, 1990, 1991, 1992, 1993 and 2008. There was no indication as to how these citations were relevant to this Order of Protection case. Additionally, the trial court file is replete with copies of reports from the Kirkland Police Department in Washington State, illustrating the contentious relationship between Plaintiff and Christine Cornish-Peddle. This Court notes Ms. Cornish-Peddle is not the object of—or included on—the Order of Protection issued against her father.

The Hassayampa Justice court held a hearing on April 17, 2012.¹ At the hearing, the trial court asked Defendant about the incident between the parties. Defendant testified he was going to meet his wife and daughter for coffee and they “always exit the area before Shaun does when the child is transferred.”² He stated he waited at the corner of Statler and Litchfield for them; and when he did not see them, he “pulled through the intersection heading toward the police station to see if the transfer had been delayed.”³ He then added when he saw Shaun go by, he knew he missed his wife and daughter so he made a U-turn and was behind Plaintiff.⁴ Defendant added Plaintiff went across the intersection and started taking pictures.⁵ Defendant asserted he waited until Plaintiff left because he—Defendant—was on a motorcycle and he did not trust what Plaintiff might do.⁶

Defendant then discussed that the parties were involved in a complex case and alleged Plaintiff had (1) “attacked” his wife through the courts⁷ and (2) was using the legal system to get a child custody case resolved in Plaintiff's favor.⁸

Plaintiff testified and agreed the parties were in a contentious situation. He said he did not want Defendant to wait for him, follow him, or drive rapidly by him.⁹ Neither litigant was offered the opportunity to cross-examine the adverse party. The trial court did not explain the procedure for a contested hearing to the parties. The trial court did not inform the parties of their right to present witnesses and did not ask the parties if they had witnesses they wished to present. The parties were not offered the opportunity to make an opening or a closing statement to the court. Both parties appeared *pro se*.

¹ Transcript of Proceedings, Order of Protection, April 17, 2012.

² *Id.* at p. 6, ll. 3–4.

³ *Id.* at p. 6, ll. 6–8.

⁴ *Id.* at p. 6, ll. 8–11.

⁵ *Id.* at p. 6, ll. 12–14.

⁶ *Id.* at p. 6, ll. 14–16.

⁷ *Id.* at p. 6, ll. 20–24.

⁸ *Id.* at p. 6, ll. 23–24; p. 7, ll. 1–4.

⁹ *Id.* at p. 8, ll. 2–25.

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At the conclusion of the abbreviated hearing, the trial court maintained the Order of Protection but failed to state its reasons for doing so. Defendant filed a timely appeal. Plaintiff failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion By Sustaining the Order Of Protection.

Defendant asserted the trial court abused its discretion¹⁰ in sustaining Plaintiff's Order of Protection. The crux of Defendant's argument is that Plaintiff failed to sustain his burden of proof to show an act of domestic violence. Because this Court finds the trial court erred and committed fundamental error in the manner in which it conducted the contested hearing, this Court does not need to further address this issue.

B. Did The Trial Court Deny Defendant Due Process By Failing To (1) Ask If Defendant Brought Witnesses; (2) Allowing Him To Introduce Evidence About The Washington Custody Proceedings; Or (3) Provide For Cross-Examination.

Defendant alleged the trial court denied him procedural due process because the trial court did not let him present his additional witnesses—his wife and daughter. Although—according to Defendant—neither his wife nor his daughter was present at the time of the March 25, 2012, incident that led Plaintiff to seek a protective order, Defendant was not apprised of his right to have his witnesses testify. This Court cannot determine the relevance or extent of the testimony these witnesses may have provided about the incident or the underlying relationship between the parties. However, according to ARPOP, Rule 8(D), Defendant had the right to present the witnesses he chose. This is an important procedural guarantee. While this Court recognizes (1) Defendant failed to request the opportunity to have these witnesses testify and (2) normally, the failure to request relief waives the opportunity to challenge the action; where, as here, the opportunity waived is critical to a fair hearing, and the failure may be the result of a lack of knowledge, the Defendant may assert the error as a fundamental error. Although fundamental error is rare in civil cases, it can occur. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37 ¶¶ 23–25 (Ct. App. 2005).

When a litigant is so restricted in presenting his or her position that the litigant lacks a meaningful opportunity to be heard, fundamental error occurs. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 ¶ 19 (2005). This violates constitutionally mandated due process guaranteed by the Fourteenth Amendment of the United States Constitution, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652 (1950) and Article 2, Section 4 of the Arizona Constitution.

¹⁰ *LeFaro v. Cahill*, 203 Ariz., 482, 485, ¶ 10, 56 P.3d56, 59, ¶ 10 (Ct. App. 2002).

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In *Marco v. Superior Court*, 17 Ariz. App. 210, 496 P.2d 210 (Ct. App. 1972), the Arizona Court of Appeals commented on the constitutional mandates required in a protective order proceeding. In *Marco, id.*, the trial court accepted counsels' averments prior to sustaining cross petitions for protective orders. The Court of Appeals vacated the trial court's action, stating:

The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial. It means that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of procedure.

Marco, id., 17 Ariz. App. at 212, 496 P.2d at 638 [citations omitted].

Failing to allow the litigants the opportunity to present witnesses was not the only procedural due process error. The trial court compounded its error by also failing to provide a reasonable opportunity to cross-examine the adverse party.¹¹ *State v. Correll*, 148 Ariz. 468, 473, 715 P.2d 721, 726 (1986). Although Rule 8(D), ARPOP, mandates the right to cross-examination in a contested hearing, the trial court did not afford either party this important constitutional right. Failing to provide the opportunity to present witnesses on one's behalf, coupled with a lack of the opportunity to cross-examine the witnesses against a litigant is fundamental error.

C. Did The Trial Court (1) Improperly Shift The Burden Of Proof And (2) Err By Failing To Afford The Litigants Closing Argument.

Defendant alleged the trial court also erred by (1) improperly shifting the burden of proof to Defendant; (2) failing to explain any of the processes to the parties;¹² and (3) failing to afford him the opportunity for a closing argument. This Court notes the problems affecting Defendant also applied to Plaintiff. Plaintiff, too, was not given an opportunity to (1) present witnesses or (2) cross-examine Defendant. Plaintiff was also denied the opportunity to make a closing argument. The trial court also failed to explain any of the procedures for a contested hearing to Plaintiff.

Plaintiff has not opposed these—or any—of Defendant's allegations. Because Plaintiff did not oppose Defendant's claims, this Court may assume Plaintiff agrees with Defendant's contention the trial court committed reversible error. See *Barrett v. Hiney*, 94 Ariz. 133, 382 P.2d 240 (1963). However, because this Court finds the contested hearing lacked due process, this Court does not need to further address these issues.

¹¹ Neither side was given the opportunity to present other witnesses. Therefore, the trial court's actions resulted in a total lack of cross-examination.

¹² Appellate Memorandum, at p. 8, ll. 14–19.

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D. Is Defendant Entitled To Attorney's Fees On Appeal.

Defendant requested attorneys' fees for this appeal. Here, because this Court determined (1) the trial court violated the procedural due process rights of both Defendant and Plaintiff and (2) Plaintiff did not oppose this appeal, this Court does not find an award of attorneys' fees to be appropriate. A.R.S. § 13-3602 (P) provides, "After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorneys' fees, if any." This statute is permissive; not mandatory. Similarly ARPOP, Rule 2(c) uses permissive language. Because Plaintiff did not contribute to the trial court's error and because Plaintiff labored under the same constraint as Defendant, this Court declines to order attorneys' fees for the appeal.

III. CONCLUSION.

This Court finds (1) the hearing did not conform to the mandates for a contested protective order hearing and (2) to the extent the hearing violated due process and was constitutionally infirm, it was infirm as to both parties. This Court shall not award attorneys' fees for the appeal.

Based on the foregoing, this Court concludes the Hassayampa Justice Court erred.

IT IS THEREFORE ORDERED vacating the judgment of the Hassayampa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Hassayampa Justice Court for a new hearing on Plaintiff's Order of Protection and all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

Judicial Officer of the Superior Court

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